

**Before the  
UNITED STATES COPYRIGHT ROYALTY JUDGES  
Washington, D.C.**

*In re*

Determination of Rates and Terms  
for Digital Performance of Sound Recordings  
and Making of Ephemeral Copies to Facilitate  
Those Performances (*Web V*)

Docket No. 19-CRB-0005-WR  
(2021-2025)

**SOUNDEXCHANGE’S LIMITED OPPOSITION TO MOTION  
FOR ACCESS TO RESTRICTED *WEB V* MATERIALS**

SoundExchange, Inc., Sony Music Entertainment (“SME”), UMG Recordings, Inc. (“UMG”), and Warner Music Group Corp. (“WMG”) (collectively, “SoundExchange”) submit this Limited Opposition to the Motion to Access and Make Use of the Restricted *Webcasting V* Initial Determination and Future Substantive Rulings filed by services participating in the *Phonorecords IV* proceeding (the “Motion”). In the Motion, Amazon.com Services LLC, Google LLC, Pandora Media, LLC, and Spotify USA Inc. (collectively, the “Moving Participants”) seek leave to access and use the restricted version of the Judges’ Initial Determination in *Webcasting V* and any future substantive rulings in that proceeding (together, the “Restricted Materials”).

Mot. at 1.

SoundExchange opposes the Motion to a limited extent. In connection with the requested disclosure, SoundExchange requests only that the Judges require the *Phonorecords IV* participants (the “*Phono IV* Participants”) to screen any outside counsel and experts involved in negotiating license agreements with sound recording companies on behalf of digital music services from discrete portions of the Restricted Materials: those related to bargaining objectives, positions and strategy. This narrow limitation on access and use is necessary to protect the

interest of affected *Webcasting V* (“Web V”) participants in commercially sensitive information, as well as their reasonable reliance on the *Webcasting V* Protective Order (the “*Web V* Protective Order”).

## INTRODUCTION

In *Web V*, SoundExchange and the licensee participants in that proceeding negotiated a protective order that extended important protections to the participants. The *Web V* Protective Order permitted participants to designate sensitive commercial and financial information as restricted, limiting its disclosure to outside counsel and experts for participants in the *Web V* proceeding. *See Web V* Protective Order at Part III-IV. The *Web V* Protective Order also precluded individuals who received restricted information from using it for any purpose other than the *Web V* proceeding. *Id.* at IV.B-C. During the course of *Web V*, SoundExchange introduced or produced restricted information pursuant to protections in the *Web V* Protective Order. In doing so, SoundExchange relied on its understanding of who would be permitted to access the information and for what purpose, including the identities of the particular individuals involved in the proceeding.

In their Motion, the *Phono IV* Participants seek access to Restricted Materials that contain incredibly sensitive commercial information. For example, the restricted version of the Determination in *Web V* quotes, paraphrases, and analyzes highly confidential internal documents related to SME, UMG, and WMG’s (the “Record Companies”) negotiations with digital music services. Those documents, and the passages incorporated in the determination, contain closely-guarded information about how the Record Companies approach licensing negotiations in general and with particular digital music services, including bargaining objectives, bargaining strategies, perceptions of bargaining power and responses thereto. The

*Web V* Determination also addresses other issues that provide reviewing individuals with unique and otherwise unavailable insight into, for example, [REDACTED]

[REDACTED]. Disclosure of these kinds of information (“Licensing Information”) to individuals involved in negotiating license agreements between sound recording companies and digital music services would impose severe and irreversible prejudice.<sup>1</sup>

The *Phono IV* and *Web V* Protective Orders (together, the “Protective Orders”) ensure that employees of the *Phono IV* Participants who are involved in negotiating license agreements with sound recording companies will not have access to any of the Restricted Material, including the Licensing Information.<sup>2</sup> However, the Protective Orders do not contain any provision to limit access for outside counsel or experts who are retained to handle or are otherwise involved in those negotiations. Disclosing the Licensing Information to outside counsel or experts who are involved in negotiation of license agreements with sound recording companies would be just as damaging to the competitive interests of the disclosing participants and their artists as disclosure to personnel employed by the *Phono IV* Participants. Indeed, it could be worse, because outside counsel may represent in negotiations digital music services other than the participants they represent in *Phono IV*, perhaps many of them.

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<sup>1</sup> Should the Judges order the *Phono IV* Participants to implement the requested screen, SoundExchange respectfully requests that they Order the participants to meet and confer to prepare a suitably redacted version of the *Web V* determination for use by screened individuals.

<sup>2</sup> The Moving Participants propose that the Judges make use of the Restricted Materials subject to the *Phono IV* and *Web V* Protective Orders and also propose that the Judges order the *Phono IV* Participants to resolve any conflicts between those Protective Orders in favor of the provision that maximizes protection. SoundExchange agrees with these proposals, which are necessary and appropriate to protect the interest of *Web V* participants in their restricted information.

To be sure, the Protective Orders prohibit outside counsel and experts from using information received during a CRB proceeding in negotiation of license agreements. And SoundExchange has no doubt that all outside counsel involved in this and every CRB proceeding aim to comply with that restriction. This is not about legal ethics. It is about well-recognized limitations on any individual's ability to compartmentalize information. In light of those well-recognized limitations, the *Phono IV* Participants should be required to screen outside counsel and experts involved in negotiating license agreements with sound recording companies from the Licensing Information. The alternative—granting relief from the Web V Protective Order to provide those individuals with access to Licensing Information—will force the Record Companies in subsequent proceedings to weigh whether the value of using Licensing Information is outweighed by the risk that such information will be made accessible to individuals who sit across the table from them in negotiations.

The limited relief that SoundExchange seeks is particularly appropriate where, as here, there has been no particularized showing that disclosure of the Licensing Information or use of it in *Phono IV* is necessary. A public version of the *Web V* determination has not yet been released. As a result, the Moving Participants understandably cannot know whether the disclosure they seek is needed to prepare their written direct cases. However, that quirk of timing does not override the sound recording company participants' powerful interest in protecting all of their restricted information, and particularly powerful interest in preventing disclosure of the Licensing Information to individuals involved in negotiating license agreements with them. Because the Moving Participants have not and cannot demonstrate that the potential usefulness of disclosing the Licensing Information to all outside counsel outweighs the need for continued restrictions—a standard articulated by the Judges in response to prior objections from Amazon—

the Licensing Information should not be disclosed to outside counsel or experts involved in negotiating sound recording license agreements on behalf of digital music services. *See* Order Granting in Part Motion for Access to the Restricted Phonorecords III Determination and Certain Restricted Phonorecords III Testimony, *Web V*, 19-CRB-0005, at 4 (Sept. 13, 2019) (hereafter “Amazon Order”).

Granting the limited relief that SoundExchange seeks is also appropriate because it would not prejudice the *Phono IV* Participants. SoundExchange only seeks to screen those outside counsel and experts who have been or are involved in negotiating license agreements with sound recording companies on behalf of digital music services. Based on its analysis of the docket, SoundExchange has determined that each *Phono IV* Participant eligible to receive restricted information will through several outside counsel of record have access to the entirety of the Restricted Materials (should the Judges grant the Motion but require the requested screen), as each participant has retained at least some outside counsel not involved in negotiating license agreements with the Record Companies. And because SoundExchange only seeks relief as to Licensing Information, individuals subject to the screen will retain access to most of the Restricted Materials that will ultimately be produced or used in *Phono IV*. In fact, those individuals will still be able to review the Judges’ ultimate conclusions regarding all issues addressed in the Motion, including conclusions as to benchmarking methodology and the market power purportedly exercised by the Record Companies. For all of the foregoing reasons, addressed in greater detail below, the Judges should order the requested screen.<sup>3</sup>

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<sup>3</sup> For the avoidance of doubt, SoundExchange does not request that any *Phono IV* Participant be required to disclose each outside counsel or expert retained to assist with this case to SoundExchange. Rather, SoundExchange requests entry of its proposed order, which would require the *Phono IV* Participants to abide by the screen as to any individuals involved in negotiating license agreements with record companies on behalf of digital music services.

## BACKGROUND

### I. *Web V* Proceeding

The *Web V* proceeding commenced on January 24, 2019. To govern the disclosure of confidential information in the proceeding, the participants negotiated and jointly proposed a protective order. The Judges entered that order on June 24, 2019.

Under the *Web V* Protective Order, sensitive commercial or financial information could be produced as restricted and protected from public view. *See* Protective Order at III-IV. Participants themselves were unable to see restricted information. Instead, access to restricted information was limited to outside counsel of record in the proceeding,<sup>4</sup> certain independent contractors, and independent experts. *Id.* at IV.B. Moreover, participants were only permitted to use the restricted information for purposes of the *Web V* proceeding. *Id.* at IV.B; *accord id.* at IV.C.

SoundExchange relied on the *Web V* Protective Order in making decisions about use of sensitive commercial and financial information during the *Web V* proceeding. For example, it relied on the protections in that Order when offering written testimony that was designated as restricted and concerned incredibly sensitive commercial information, such as bargaining objectives, bargaining strategy, perceptions of bargaining power, and the [REDACTED]  
[REDACTED]. SoundExchange also relied on the *Web V* Protective Order in taking positions concerning discovery requests that sought some of

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<sup>4</sup> Firms retained in the *Web V* proceeding are identified on the docket for that proceeding, 19-CRB-0005-WR (2021-25). To the Record Companies' knowledge, none of the counsel of record are currently involved in negotiating license agreements between digital music services and sound recording companies. *See* Declaration of Aaron Harrison (Harrison Decl.) ¶ 5; Declaration of Mark Piibe (Piibe Decl.) ¶ 5; Declaration of Jon Glass (Glass Decl.) ¶ 5.

the most sensitive documents held by record company participants, such as a large number of closely held internal emails related to negotiations with particular music services.

The Determination in *Web V* contains granular analysis of testimony and documents related to licensing objectives, positions and strategy. It also contains granular analysis of negotiations between particular sound recording companies and interactive services. These portions of the Determination include, among other things, quotations and characterizations of internal company emails that discuss bargaining strategy, identify bargaining objectives and evaluate counterparty proposals.<sup>5</sup> They also include quotations and characterizations of testimony and documents that discuss, for example, [REDACTED], [REDACTED], Final Determination at 18-20 & n.29, [REDACTED], [REDACTED], Final Determination at 27-28, and [REDACTED], [REDACTED]. Final Determination at 49 n.51.

## II. *Phono IV* Proceeding

SoundExchange, Inc. is not a participant in *Phono IV*. The Record Companies have filed petitions to participate in that proceeding, but have reached a settlement and do not expect to be materially involved in that proceeding.<sup>6</sup> Participants eligible to obtain access to and use the

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<sup>5</sup> See, e.g., Final Determination at 35-38 (analyzing evidence concerning UMG-Spotify negotiations); *id.* at 39-42 (analyzing evidence concerning WMG-Spotify negotiations); *id.* at 43-46 (analyzing evidence concerning SME-Spotify negotiations); *id.* at 49 (quoting internal communications that addresses [REDACTED]).

<sup>6</sup> SME, UMG, and WMG oppose the Motion in their capacity as *Web V* participants and in their capacity as *Phono IV* Participants. Their response is filed on the *Web V* docket because the Motion seeks relief from the *Web V* protective order, concerns information offered or produced in connection with the *Web V* proceeding, and—most importantly—contains restricted information that is currently protected from disclosure to outside counsel for the *Phono IV* participants, including outside counsel who negotiate license agreements with sound recording companies.

Restricted Materials include the Moving Participants, as well as Apple Inc., the Nashville Songwriters Association International (“NSAI”), and the National Music Publishers’ Association (“NMPA”). Outside counsel representing the eligible participants include several firms that did not appear in the *Web V* proceeding, including counsel for Google LLC, Apple Inc, and the Copyright Owners (NSAI and NMPA).

On July 16, 2021, the Moving Participants filed the Motion, requesting that *Phono IV* Participants be granted leave to access and use the Restricted Materials. Mot. at 1. On July 19, 2021, the Judges issued an Order granting the *Web V* participants leave to respond to the Motion. In their Order, the Judges characterize the Motion as a request for relief from the *Web V* protective order.

### **ARGUMENT**

In evaluating requests for relief from a protective order, the Judges have required that moving parties demonstrate good cause. Amazon Order at 4. Generally, the party seeking modification of the protective order bears the burden of demonstrating that good cause exists for the modification. *United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am.*, No. Civ. 99-3298, 2004 WL 2009414, at \*2 (D.D.C. May 17, 2004). Modification of a protective order will not be granted absent a sufficient showing that the utility of accessing particular restricted materials outweighs the need for continued restrictions. Amazon Order at 4.

SoundExchange’s opposition to the requested modification is limited. In connection with disclosure of the Restricted Materials to the *Phono IV* Participants, SoundExchange requests only that the Judges require the *Phono IV* Participants to screen outside counsel and experts involved in negotiating license agreements with sound recording companies on behalf of digital music services from the Licensing Information. As set out below, the proposed screen is



appropriate because disclosing the Licensing Materials to outside counsel and experts involved in those negotiations would be highly prejudicial, because there has been no particularized showing that persons involved in license negotiations need access to the Licensing Information for purposes of *Phono IV*, and because the proposed screen would not prejudice any of the *Phono IV* Participants.

**I. Disclosing the Licensing Information to Outside Counsel and Experts Who Are Involved in Negotiating License Agreements Between Sound Recording Companies and Digital Music Services Would Be Highly Prejudicial**

Sound recording companies and the artists with whom they work are increasingly dependent on revenues and exposure from digital music services. SoundExchange Proposed Findings of Fact and Conclusions of Law ¶¶ 306-308, Docket No. 19-CRB-0005. Except for the services that rely on the statutory license, the relationships between sound recording companies and those services are addressed in long and detailed agreements that are generally heavily negotiated.

Under the circumstances, disclosing the Licensing Information to outside counsel and experts who negotiate digital licensing agreements is improper, not because those individuals would intentionally disregard the requirement that restricted information be used only for purposes of the *Phono IV* proceeding,<sup>7</sup> but rather because “it is very difficult for the human mind to compartmentalize and selectively suppress information once learned, no matter how well-intentioned the effort may be to do so.” *FTC v. Exxon Corp.*, 636 F.2d 1336, 1350 (D.C. Cir. 1980); *see also FTC v. Advoc. Health Care Network*, 162 F. Supp. 3d 666, 670 (N.D. Ill. 2016) (“The inescapable reality is that once an expert—or a lawyer for that matter—learns the

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<sup>7</sup> SoundExchange does not for a minute doubt that all outside counsel in CRB take their ethical obligations seriously and, as discussed above, aim to abide by the Protective Orders.

confidential information that is being sought, that individual cannot rid himself of the knowledge he has gained; he cannot perform a prefrontal lobotomy on himself, as courts in various contexts have recognized”). Once learned, information concerning sound recording companies’ bargaining objectives, positions and strategy from the Determination would necessarily inform subsequent negotiations,<sup>8</sup> prejudicing the Record Companies’ ability to negotiate and working serious commercial harm. Harrison Decl. ¶¶ 3, 4, 6; Piibe Decl. ¶¶ 3, 4, 6; Glass Decl. ¶¶ 3, 4, 6.

In light of the prejudice the Record Companies would suffer if the Licensing Information were disclosed, application of a screen is not only necessary, but also consistent with protective measures applied to counsel and experts who play a role in the competitive decision-making of clients who retain them.<sup>9</sup> See, e.g., *In re Deutsche Bank Tr. Co. Ams.*, 605 F.3d 1373, 1378 (Fed. Cir. 2010) (quoting *U.S. Steel Corp. v. United States*, 730 F.2d 1465, 1468 (Fed. Cir. 1984)). Indeed, courts routinely deny access to protected information or order alternative measures to safeguard sensitive information where counsel’s status as a competitive decisionmaker necessarily risks inadvertent and prejudicial disclosure. See, e.g., *Silversun Indus., Inc. v. PPG Indus., Inc.*, 296 F. Supp. 3d 936, 947 (N.D. Ill. 2017) (denying counsel access to confidential information in trade secret case); *FTC v. Sysco Corp.*, 83 F. Supp. 3d 1, 4 (D.D.C. 2015) (denying in-house counsel access to confidential information in antitrust matter); *Interactive*

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<sup>8</sup> The final rates and terms of each digital license agreement are also extremely sensitive and the Record Companies reserve all rights to object to the disclosure of those agreements and related documents in the *Phono IV* and other subsequent proceedings.

<sup>9</sup> The term “competitive decisionmaking” operates as “shorthand for a counsel’s activities, association, and relationship with a client that are such as to involve counsel’s advice and participation in any or all of the client’s decisions (pricing, product design, etc.) made in light of similar or corresponding information about a competitor,” *U.S. Steel Corp. v. United States*, 730 F.2d 1465, 1468 n.3 (Fed. Cir. 1984). In complex regulated industries such as the market for digital music services, the term is interpreted broadly. See *United States v. Aetna, Inc.*, Case No. 16-cv-01494, 2016 WL 8738420, at \*5 (D.D.C. Sept. 5, 2016).

*Coupon Mktg. Grp., Inc. v. H.O.T.! Coupons, LLC.*, No. 98 C 7408, 1999 WL 618969, at \*4 (N.D. Ill. Aug. 9, 1999) (upholding patent prosecution bar for outside counsel with history and likely continued representation of client in related matters); *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1471 (9th Cir. 1992) (requiring confidential information to be relayed through independent consultant where “counsel’s employment would necessarily entail advising . . . in areas relating to [opponent’s] trade secrets”). Indeed, when outside counsel are actively involved in negotiating license agreements on behalf of digital music services, their access to the Licensing Information presents the same concern as access for in-house counsel, who are routinely and categorically prohibited from accessing all restricted information under protective orders entered by the Judges (including the Protective Orders).

For example, in *Intel Corp. v. VIA Technologies, Inc.*, 198 F.R.D. 525 (N.D. Cal. 2000), an in-house counsel was denied access to confidential information in part because her “active[] involve[ment] in negotiating the terms of licensing agreements” meant that “her advice and counsel necessarily affect[ed] licensing decisions.” *Id.* at 530. Although counsel in that case did not retain final authority to approve any agreement, the court was convinced that simultaneously advising decisionmakers and endeavoring to maintain confidentiality “would put [counsel] in the untenable position of having either to refuse to offer crucial legal advice at times or risk disclosing protected information.” *Id.* Thus, counsel’s “involvement in licensing agreements and interactions with [client’s] business unit managers . . . involve[d] her in competitive decisionmaking and present[ed] an unacceptable risk of inadvertent disclosure.” *Id.* at 531-32.

So too here. SoundExchange is aware of at least one outside counsel of record in *Phono IV* who represents digital music services in negotiations with sound recording companies. Specifically, Mr. Gary Greenstein, who is among the lawyers representing Google LLC in this

proceeding, regularly is involved in license negotiations with sound recording companies on behalf of numerous digital music services. Harrison Decl. ¶ 6; Piibe Decl. ¶ 6; Glass Decl. ¶ 6. To be clear, SoundExchange does not mean to call Mr. Greenstein's ethics into question or suggest that he would not try to comply with his obligations under the Protective Orders, but SoundExchange is deeply concerned about revealing the negotiating playbook of the Record Companies to someone who is often involved in negotiating on behalf of counterparties. It simply is not reasonable to expect that anyone who learned about the sound recording companies' bargaining objectives, positions and strategy from the Determination could so compartmentalize their thinking as to avoid having that information inform their negotiations. For example, if Mr. Greenstein knew that sound recording companies [REDACTED], it would be impossible for that information not to inform his approach to negotiating [REDACTED]. In this respect, and others, disclosing the Licensing Information to Mr. Greenstein is no different than disclosing the Licensing Information to the in-house counsel who negotiate license agreements for digital music services participating in *Phono IV*.

Failure to screen Mr. Greenstein or any similarly situated outside counsel or experts would create an untenable risk of severe competitive disadvantage, including because access to the Licensing Information would provide a counterparty with access to information about the Record Companies' bargaining objectives, bargaining strategies, and perceptions of bargaining power, in addition to providing a counterparty with insight into [REDACTED]. The participants in *Web V* made determinations about whether to offer Licensing Information based in part on their expectation that the information would not be disclosed to

individuals involved in negotiating license agreements on behalf of digital music services. Those expectations instilled confidence that information could be provided without working substantial prejudice in future negotiations with digital music services and allowed the Participants to build a robust record. But granting relief from the Web V Protective Order to allow one or more individuals involved in negotiations with sound recording companies to access Licensing Information will force the Record Companies in subsequent proceedings to weigh whether the value of using similar information outweighs the risk that any rules governing use of that information may be overridden to provide access to those individuals in future proceedings (including in proceedings where the Record Companies are not participating or actively participating).

In sum, even with the best efforts of outside counsel and experts, possession of the Licensing Information will inevitably color both the structure and content of the assistance provided in negotiations with sound recording companies, thus prejudicing the Record Companies by putting them at a substantial disadvantage in those negotiations. As a result, application of a screen is warranted.

## **II. There Has Been No Showing that Disclosing the Licensing Information to Individuals Who Negotiate Digital License Agreements Is Necessary**

The limited relief that SoundExchange seeks is particularly appropriate where, as here, there has been no showing that disclosure of the Licensing Information is necessary.

The Moving Participants argue primarily that the requested disclosure is appropriate because the *Phonorecords* and *Webcasting* proceedings are decided under similar legal standards, because “the two proceedings may concern overlapping issues,” and because access will enable the *Phono IV* Participants to make “informed decisions as to the presentation of their direct cases.”

*Id.* at 2-3. According to the Services, this means the Restricted Materials may be relevant and thus should be disclosed. Mot. 3.

The Moving Participants are wrong. Their argument is predicated on a misreading of the Amazon Order. In that Order, the Judges partially granted a request to access and use restricted material from a prior proceeding because they found doing so would enhance the evidentiary record. Amazon Order at 1, 5-6. However, the Judges only granted the request for access to the extent it was not opposed. *Id.* As to the one Participant that opposed access—Amazon—the Judges reached a different conclusion. Even though the Judges found that access to materials weighed in a prior proceeding could enhance the evidentiary record and were relevant, *id.* at 3 (rejecting Amazon’s relevance argument), they refused to authorize access to and use of Amazon materials without a showing of good cause as to the *particular* information that Amazon restricted, and also ordered specific procedures to ensure they could assess whether the potential usefulness of particular information outweighed the need for continued restrictions on disclosure as to the same. *Id.* at 4.

The same approach should apply to the Licensing Information in this case. Given the Record Companies’ interest in ensuring that the Licensing Information is not disclosed to individuals who negotiate license agreements with them, no disclosure to those individuals should be permitted until the Moving Participants make a particularized showing that access to the Licensing Information for those individuals is needed to facilitate preparation of their written cases, and a further showing that the need for the Licensing Information outweighs the need for continued restrictions on disclosure (including to avoid prejudice to the Record Companies).<sup>10</sup>

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<sup>10</sup> In the Motion, the Moving Participants also observe that the Judges have previously granted requests for access to material produced pursuant to protective orders in a previous proceeding.

While SoundExchange appreciates that all outside counsel for the Moving Participants are anxious to review a restricted version of the *Web V* Determination in connection with preparation of written direct cases, their desire to do so does not outweigh the interest in tailoring any relief from the *Web V* Protective Order to the specific requirements of this case.

### **III. Screening Individuals Involved in the Negotiation of Digital License Agreements with Sound Recording Companies Will Not Prejudice any *Phono IV* Participants**

Granting the limited relief that SoundExchange seeks is also appropriate because it would not prejudice the *Phono IV* Participants. In determining whether and to what extent a protective order should bar one party's attorney access to information, courts balance the risk associated with disclosure and the risk that a party will be impaired in its ability to litigate claims. *See U.S. Steel Corp.*, 730 F.2d at 1468.

In this case, SoundExchange only seeks to screen a limited set of outside counsel and experts from a limited amount of material. Based on its review of the docket, SoundExchange has determined that each participant eligible to receive restricted information will have outside counsel with access to all of the Restricted Material (should the Judges grant the Motion but require the requested screen). And because SoundExchange only seeks relief as to Licensing

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They conclude that access should therefore be permitted here. Mot. at 2. But that conclusion does not follow. The pertinent question is why the Judges have previously granted access and whether the Moving Participants have offered a sufficient basis to do so here. As set out above, they have not. And SoundExchange notes that the Judges have not previously granted access before issuance of a public determination in the operative case. *See, e.g.*, Amazon Order at 6; *accord* Order on SoundExchange Motion for Access to Restricted *Web IV* evidence; *SDARS III*, Docket No. 16-CRB-00001 SR/PSSR (2018-2022) (Jan. 25, 2017) (granting access to *Webcasting IV* restricted materials); Order Granting Motion to Set Specific Discovery Deadlines and Compel the Copyright Owner Participants' Adherence to their Discovery Obligations at 4, *SDARS III*, Docket No. 16-CRB-00001 SR/PSSR (2018-2022) (Aug. 23, 2016) (same); Order Granting in Part and Denying in Part Services' Omnibus Motion to Compel SoundExchange to Produce Documents at 5, *Web IV*, Docket No. 14-CRB-0001-WR (2016-2020) (Jan. 15, 2015) (granting access to prior unredacted testimony in *Webcasting II* and *Webcasting III*).

Information, individuals subject to the screen will retain access to much of the Restricted Materials. In fact, those individuals will still be able to review the Judges' ultimate conclusions regarding all issues addressed in the Motion, including conclusions as to benchmarking methodology and the market power purportedly exercised by the Record Companies.

Given the limited nature of the screen that SoundExchange seeks, no participant eligible to access and use restricted information will be impaired in its ability to review and make use of the Restricted Materials. Nor will the limited screen impose any tactical disadvantage on the *Phono IV* Participants. As an initial matter, the screen will apply with equal force to all *Phono IV* Participants (other than the Record Companies, who have settled and do not expect to participate materially in *Phono IV*). More importantly, the screen will not require that any participant disclose its outside counsel or experts to other participants or the *Web V* participants in advance of any public filing. Rather, each *Phono IV* participant will be obligated to ensure that it complies with the terms of the Order entered on the Motion, by implementing a screen as to any outside counsel or expert covered by the terms of the Order.

Implementation of a screen will not impose significant burdens. It will simply require ensuring that individuals involved in negotiating digital license agreements with the Record Companies do not have access to the Licensing Information, materials that make use of the Licensing Information, or conversations that disclose the Licensing Information. In law firms, this is common practice. And it is well less constraining than the more prophylactic measures adopted in other contexts. *See, e.g., Methode Elecs., Inc. v. DPH-DAS LLC*, 679 F. Supp. 2d 828, 834 (E.D. Mich. 2010) (imposing patent prosecution bar where access to information would enable counsel to "write patent application claims that he wouldn't otherwise write and get patent rights for" his client (quoting counsel at hearing)); *Commissariat A L'Energie v. Dell*



*Computer Corp.*, No. Civ. A. 03-484, 2004 WL 1196965, at \*3 (D. Del. May 25, 2004) (holding that where CEA's patent attorneys were prosecuting patents in the field of technology involved in the litigation, they must be barred from having access to Dell's highly confidential information or be prohibited from prosecuting patents in that field of technology for one year following conclusion of the litigation).

### CONCLUSION

For the foregoing reasons, SoundExchange respectfully requests that the Judges require *Phono IV* Participants eligible to receive the Restricted Materials to screen outside counsel and experts who are involved in negotiating license agreements with sound recording companies from the Licensing Information.

Dated: July 30, 2021

Respectfully submitted,

By: /s/ Alex Trepp

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Docket No. 19-CRB-0005-WR  
(2021-2025)

**DECLARATION OF AARON HARRISON  
(On behalf of UMG Recordings, Inc.)**

1. My name is Aaron Harrison, and I am Senior Vice President, Business & Legal Affairs, Digital, UMG Recordings, Inc. (“UMG”). I submitted written testimony and testified at the hearing in this proceeding. I submit this declaration in support of SoundExchange’s Limited Opposition to the Services’ Updated Motion to Access or Make Use of the Restricted *Webcasting V* Initial Determination and Future Substantive Rulings.

2. As I testified in my written direct testimony, I have negotiated more than 100 significant agreements with digital music services on behalf of UMG as part of the Digital Business and Legal Affairs (“BLA”) team in the last fourteen years. Negotiating agreements with digital music services is one of the main responsibilities of the BLA team.

3. I would be deeply concerned, and believe UMG would suffer serious commercial harm, if any outside counsel or experts who are involved in negotiating license agreements with UMG on behalf of digital music services could access restricted portions of the Judges’ determination in *Webcasting V*, or restricted portions of any future substantive rulings in this proceeding, relating to our bargaining objectives, positions and strategy in negotiations with digital music services. Our agreements with digital music services are heavily negotiated. And while the terms of each agreement are extremely sensitive, we view our negotiating objectives, the back-

and-forth over particular provisions, and our assessment of various positions and contractual language as even more sensitive. Anyone with access to that information would understand where we have negotiating flexibility and could (even unintentionally) use that information to the advantage of our counterparties in future negotiations.

4. In developing my testimony in this proceeding, UMG and I were very mindful of the extremely sensitive nature of our negotiations with digital music services. Our willingness to address details of those negotiations in my testimony depended on our comfort and reliance that the protective order in the proceeding provided, including that the material would be used only for purposes of this proceeding, and would not prejudice future business negotiations. Disclosing any detailed and closely guarded information about how UMG approaches license negotiations—including bargaining objectives, bargaining strategies, perceptions of bargaining power, and responses thereto—to someone involved in negotiating license agreements with UMG on behalf of digital music services would prejudice us in any future negotiations involving that person.

5. To my knowledge, none of the counsel who have entered appearances in Webcasting V are currently involved in negotiating license agreements between digital music services and sound recording companies.

6. I have reviewed a list of counsel who have entered appearances in the *Phonorecords IV* proceeding, Docket No. 21-CRB-0001-PR. One of those attorneys, Mr. Gary Greenstein, is someone who regularly negotiates agreements with UMG on behalf of various clients. At present, he is involved in approximately four pending negotiations with UMG for different clients of his, and we have previously negotiated multiple agreements with Mr. Greenstein on behalf of his clients. While I do not mean to call Mr. Greenstein's ethics into question or suggest that he would intentionally fail to comply with his obligations under applicable protective orders, I would be

very concerned about his having access to information about our bargaining objectives, positions and strategy, because that knowledge would (despite all best intentions) affect his approach to future negotiations. None of the other *Phonorecords IV* counsel is, to my knowledge, involved in negotiating license agreements with UMG on behalf of digital music services.

Pursuant to 28 U.S.C. § 1746 and 37 C.F.R. § 350.6(d), I hereby declare under the penalty of perjury that, to the best of my knowledge, information and belief, the foregoing is true and correct.

Dated: July 30, 2021

/s/ Aaron Harrison  
Aaron Harrison  
Senior Vice President  
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**Before the  
UNITED STATES COPYRIGHT ROYALTY JUDGES  
Washington, D.C.**

In the Matter of:

Determination of Rates and Terms for  
Digital Performance of Sound Recordings  
and Making of Ephemeral Copies to  
Facilitate those Performances (Web V)

Docket No. 19-CRB-0005-WR  
(2021-2025)

**DECLARATION OF MARK PIIBE  
(On behalf of Sony Music Entertainment)**

1. My name is Mark Piibe, and I am the Executive Vice President for Global Business Development and Digital Strategy at Sony Music Entertainment (“SME”). I submitted written testimony and testified at the hearing in this proceeding. I submit this declaration in support of SoundExchange’s Limited Opposition to the Services’ Updated Motion to Access to Make Use of the Restricted Webcasting V Initial Determination and Future Substantive Rulings.

2. As I testified in my written direct testimony, I participate directly in a substantial number of our negotiations with digital services. During the course of my employment at Sony, I have led or contributed to hundreds of negotiations with digital music services.

3. I would be concerned, and believe SME would suffer potentially serious commercial harm, if outside counsel or experts who are involved in negotiating license agreements with SME on behalf of digital music services could access restricted portions of the Judges’ determination in Webcasting V, or restricted portions of any future substantive rulings in this proceeding, relating to our bargaining objectives, positions and strategy in negotiations with digital music services. Our agreements with digital music services are heavily negotiated. And while we view the terms of each agreement as extremely sensitive, our negotiating objectives, the back-and-forth over particular provisions, and our assessment of various positions and contractual language

are even more so. Anyone with access to that information would understand where we have negotiating flexibility and could (even unintentionally) use that information to the advantage of our counterparties in future negotiations.

4. In developing my testimony in this proceeding, SME and I were very mindful of the extremely sensitive nature of our negotiations with digital music services. Our willingness to address details of those negotiations in my testimony depended on our comfort that the material included would be used only for purposes of this proceeding, and would not prejudice future business negotiations. Disclosing detailed and closely guarded information about how SME approaches license negotiations—including bargaining objectives, bargaining strategies, perceptions of bargaining power and responses thereto—to someone involved in negotiating license agreements with SME on behalf of digital music services would prejudice us in any future negotiations involving that person.

5. To my knowledge, none of the counsel who have entered appearances in Web V are currently involved in negotiating license agreements between digital music services and sound recording companies.

6. I have reviewed a list of counsel who have entered appearances the Phonorecords IV proceeding, Docket No. 21-CRB-0001-PR. One of those attorneys, Mr. Gary Greenstein has been involved in at least 10 negotiations with SME for different clients of his over the past five years. While I do not mean to call Mr. Greenstein's ethics into question or suggest that he would not try to comply with his obligations under applicable protective orders, I would be concerned about his having access to information about our bargaining objectives, positions and strategy, because that knowledge would (despite all best intentions) inform his approach to future

negotiations. None of the other Phono IV counsel is, to my knowledge, involved in negotiating license agreements with SME on behalf of digital music services.

Pursuant to 28 U.S.C. § 1746 and 37 C.F.R. § 350.6(d), I hereby declare under the penalty of perjury that, to the best of my knowledge, information and belief, the foregoing is true and correct.

Dated: July 30, 2021

/s/ Mark Piibe  
Mark Piibe  
Executive Vice President  
Global Business Development and Digital Strategy  
Sony Music Entertainment  
25 Madison Ave  
New York, NY 10010

**Before the  
UNITED STATES COPYRIGHT ROYALTY JUDGES  
Washington, D.C.**

In the Matter of:

Determination of Rates and Terms for  
Digital Performance of Sound Recordings  
and Making of Ephemeral Copies to  
Facilitate those Performances (Web V)

Docket No. 19-CRB-0005-WR  
(2021-2025)

**DECLARATION OF JON GLASS  
(On behalf of Warner Music Group)**

1. My name is Jon Glass and I am Senior Vice President and the Head of Digital Legal Affairs at Warner Music Group (“WMG”). I submit this declaration in support of SoundExchange’s Limited Opposition to the Services’ Updated Motion to Access and to Make Use of the Restricted *Webcasting V* Initial Determination and Future Substantive Rulings.

2. I participate directly in a substantial number of WMG’s negotiations with digital services. During the course of my employment at WMG, I have negotiated or assisted in negotiating hundreds of agreements with digital music services.

3. I would be deeply concerned, and believe WMG would suffer serious commercial harm, if any outside counsel or experts who are involved in negotiating license agreements with WMG on behalf of digital music services could access restricted portions of the Judges’ Determination in *Webcasting V* (“*Web V*”), or restricted portions of any future substantive rulings in this proceeding, relating to WMG’s bargaining objectives, positions and strategy in negotiations with digital music services. WMG’s agreements with digital music services are heavily negotiated. And while WMG views the terms of each agreement with a digital music service as extremely sensitive, WMG’s negotiating objectives, the back-and-forth communications over particular provisions, and WMG’s assessment of various positions and contractual language are



even more so. Anyone with access to that information would understand where WMG has negotiating flexibility and could (even unintentionally) use that information to the advantage of WMG's counterparties in future negotiations.

4. I was involved in assisting with the presentation of evidence on behalf of WMG in this proceeding. During that process, WMG witnesses and personnel were very mindful of the extremely sensitive nature of WMG's negotiations with digital music services. WMG's willingness to address details of those negotiations in testimony and through documentary evidence depended on WMG's comfort that the material included would be used only for purposes of this proceeding, and would not prejudice future business negotiations. Disclosing any detailed and closely guarded information about how WMG approaches license negotiations—including bargaining objectives, bargaining strategies, perceptions of bargaining power, and responses thereto—to someone involved in negotiating license agreements with WMG on behalf of digital music services would prejudice WMG in any future negotiations involving that person.

5. To my knowledge, none of the counsel who have entered appearances in *Web V* are currently involved in negotiating license agreements between digital music services and sound recording companies.

6. I have reviewed a list of counsel who have entered appearances in the Phonorecords IV proceeding, Docket No. 21-CRB-0001-PR ("*Phono IV*"). One of those attorneys, Mr. Gary Greenstein, is someone who regularly negotiates agreements with WMG on behalf of various clients. To be clear, I am not calling Mr. Greenstein's ethics into question or suggesting that he would not try to comply with his obligations under applicable protective orders as I hold him in high regard. But WMG has serious concerns about Mr. Greenstein having access to information about WMG's bargaining objectives, positions and strategy, because that knowledge would

(despite all best intentions) affect his approach to future negotiations. None of the other *Phono IV* counsel is, to my knowledge, someone who has been involved in negotiating license agreements between digital music services and sound recording companies.

Pursuant to 28 U.S.C. § 1746 and 37 C.F.R. § 350.6(d), I hereby declare under the penalty of perjury that, to the best of my knowledge, information and belief, the foregoing is true and correct.

Dated: July 30, 2021

/s/ Jon Glass  
Jon Glass  
SVP, Head of Digital Legal Affairs  
Warner Music Group  
1633 Broadway  
New York, NY 10019

# Proof of Delivery

I hereby certify that on Friday, July 30, 2021, I provided a true and correct copy of the Soundexchange's Limited Opposition To Motion For Access To Restricted Web V Materials to the following:

Google Inc., represented by Kenneth L Steinthal, served via ESERVICE at ksteinthal@kslaw.com

SAG-AFTRA, represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

Sirius XM Radio Inc., represented by Benjamin E. Marks, served via ESERVICE at benjamin.marks@weil.com

American Federation of Musicians of the United States and Canada, The, represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

American Association of Independent Music ("A2IM"), The, represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

National Association of Broadcasters, represented by Sarang V Damle, served via ESERVICE at sy.damle@lw.com

Pandora Media, LLC, represented by Benjamin E. Marks, served via ESERVICE at benjamin.marks@weil.com

Jagjaguwar Inc., represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

Educational Media Foundation, represented by David Oxenford, served via ESERVICE at doxenford@wbklaw.com

National Religious Broadcasters Noncommercial Music License Committee, represented by Karyn K Ablin, served via ESERVICE at ablin@fhhlaw.com

Signed: /s/ Alex S. Trepp